LOW LIAN KOON & ANOR

v.

MENG FONG REALTY SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S6-24-869-2004]
2 MAY 2005

LANDLORD AND TENANT: *Parties - Tenants - First option to purchase - Plaintiffs as tenants failed to endorse tenancy - Whether interests protected against a bona fide purchaser - National Land Code, s. 228(1) - Whether provides protection to unregistered tenants - Whether word 'may' in s. 228(1) NLC makes it mandatory for first defendant to sell to plaintiffs - Whether first defendant under obligation to offer plaintiffs first option to purchase*

LANDLORD AND TENANT: *Lease - Power of leasing - Option for renewal - Premises purchased by second defendant from first defendant - Whether second defendant bound by tenancy agreement between plaintiffs and first defendant - Whether second defendant's prerogative to refuse renewal of tenancy in favour of plaintiffs - Refusal of plaintiffs to sign deed of novation - Whether proof plaintiffs had no intention to create written contractual obligation with second defendant - National Land Code, s. 267(2) - Whether only recognises tenancy endorsed on register document of title*

The plaintiffs signed a tenancy agreement with the first defendant in regard to a piece of property ('the premises'). By way of a sale and purchase agreement, the first defendant sold the premises to the second defendant without the knowledge of the plaintiffs. When the tenancy agreement between the plaintiffs and the first defendant expired, the second defendant as the new owner of the premises refused to renew the tenancy for a further period of two years in favour of the plaintiffs. Hence, by way of encl. 1, the plaintiffs filed the present suit against the first defendant because it had failed to provide the first option to purchase the premises to the plaintiffs. Further, the plaintiffs also sought an order that a renewal of the tenancy be granted to the plaintiffs.

Held (dismissing encl. 1):

[1] The word 'may' in s. 228(1) of the National Land Code would not make it mandatory for the first defendant to sell the said premises to the plaintiffs. The first defendant was under no obligation whatsoever to offer the plaintiffs the first option to purchase the premises in question. Section 228(1) of the NLC did not provide protection to the plaintiffs who were the unregistered tenants. (p 398 c-d)

[2] The second defendant was not only the purchaser of the premises, it was also the registered proprietor. It was the prerogative of the second defendant to refuse to renew the tenancy in favour of the plaintiffs for a further period of two years without assigning any reasons whatsoever. The second defendant was certainly not bound by the existence of that tenancy agreement between the plaintiffs and the first defendant. (p 400 a-b & g-i)

[3] The refusal on the part of the plaintiffs to sign a deed of novation showed that the plaintiffs had no intention to create any written contractual obligations with the second defendant. Section 267(2) of the NLC recognises only a tenancy that has been endorsed on the register document of title. The second defendant would not indemnify the first defendant against any claim instituted by the plaintiffs under the tenancy agreement because that tenancy agreement was created between the plaintiffs and the first defendant before the transfer of the premises to the second defendant. In the absence of a novation agreement, the second defendant was not under any capacity nor obligation to offer the renewal of the tenancy to the plaintiffs for a further period of two years. (p 401 a-c)

Case(s) referred to:

Annison v. District Auditor for St Pancras BC [1962] 1 QB 489 ***(refd)***
Berry v. British Transport Commission [1962] 1 QB 306 ***(refd)***
Beswick v. Beswick [1968] AC 58 ***(refd)***
Cooper v. Hall [1968] 1 WLR 360 ***(refd)***
Green v. Russell [1959] 2 QB 226 ***(refd)***
Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd [1991] 1 MLJ 404 SC ***(refd)***
Kepong Prospecting Ltd v. Schmidt [1968] AC 810 ***(refd)***
Lee v. Bude, etc, Ry [1871] LR 6 CP 576 ***(refd)***
Nicholl v. Allen [1862] 31 LJ QB 283 ***(refd)***
Rasbora Ltd v. JCL Marine Ltd [1977] 1 Lloyd's Rep 645 ***(refd)***
Stylo Shoes v. Prices Tailors [1960] 2 WLR 8 ***(refd)***
The Aktion [1987] 1 Lloyd's Rep 283 ***(refd)***
The Blankenstein [1985] 1 WLR 435 ***(refd)***
Tweddle v. Atkinson [1861] I B & S 393 ***(refd)***
Universal Cargo Carriers v. Citati [1957] 1 WLR 979 ***(refd)***

Legislation referred to:
National Land Code, ss. 267(2), 228(1)

Other source(s) referred to:
Halsbury's Laws of Malaysia, vol. 8, p. 562

For both the plaintiffs - Yap Shao Ree; M/s CK Lee & Assocs
For the 1st defendant - Mohd Hanif Idris; M/s Nazri Aziz & Wong
For the 2nd defendant - Ab Wahab Che Kob; M/s Kamarudin, Wee & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of the originating summons in encl. (1), the plaintiffs sought for the following prayers:

1. Deklarasi bahawa menurut Seksyen 228 Kanun Tanah Negara 1965, Defendan Pertama perlu membuat tawaran jualan kepada Plaintif-Plaintif sebagai penyewa yang sedia ada di hartanah No. 51, Lorong Meranti, Off Jalan Kenanga, 55200 Kuala Lumpur (`premis tersebut') sebelum Defendan Pertama menjual premis tersebut kepada Defendan Kedua.

2. Deklarasi bahawa Plaintif-Plaintif sebagai penyewa di premis tersebut juga mempunyai pengharapan yang munasabah ('Legitimate Expectation') bahawa Plaintif-Plaintif diberi keutamaan membeli premis tersebut semasa Defendan Pertama bercadang untuk menjual premis tersebut.

3. Deklarasi bahawa Defendan Pertama telah memungkiri obligasi statutori dan/atau terma ekspreks atau tersurat perjanjian tenansi bertarikh 6/7/2001 di antara Plaintif-Plaintif dengan Defendan Pertama berkenaan dengan premis tersebut ('Perjanjian Tenansi tersebut') memandangkan Defendan Pertama telah menjual premis tersebut kepada Defendan Kedua tanpa memberi tawaran atau notis terlebih dahulu kepada Plaintif-Plaintif untuk membelinya.

4. Deklarasi bahawa Defendan Kedua sebagai pemilik baru premis tersebut adalah terikat dengan Perjanjian Tenansi tersebut.

5. Deklarasi bahawa Defendan Pertama dan/atau Defendan Kedua telah memungkiri klausa 3 (Jadual Tiga) Perjanjian Tenansi tersebut dengan enggan, gagal dan/atau abai untuk melanjutkan tempoh lanjutan tenansi selama 2 tahun yang diperuntukkan setelah penamatan pada 1/9/2004.

6. Defendan Pertama membayar Plaintif-Plaintif gantirugi yang akan ditaksirkan oleh Penolong Kanan Pendaftar akibat kegagalan Defendan Pertama memberi tawaran membeli premis tersebut kepada Plaintif-Plaintif dan/atau kegagalan Defendan Kedua melanjutkan tempoh tenansi tersebut.

7. Perintah perlaksanaan spesifik supaya Defendan Kedua diarah memberi lanjutan tempoh tenansi premis tersebut kepada Plaintif-Plaintif sehingga tempoh 31/8/2006 berdasarkan terma-terma yang sedia ada.

   Dalam alternatif, Defendan Kedua membayar Plaintif-Plaintif gantirugi yang akan ditaksirkan oleh Penolong Kanan Pendaftar.

8. Kos permohonan ini dibayar oleh Defendan-Defendan.

9. Lain-lain arahan atau perintah yang Mahkamah Terhormat ini berpendapat sesuai berkenaan dengan hak-hak Plaintif-Plaintif terhadap Defendan-Defendan.

Briefly put, the plaintiffs sought for a declaration, damages and specific relief to be granted against the first defendant by the name of Meng Fong Realty Sdn Bhd because it was said that the first defendant had failed to provide the first option to purchase the premises known as No: 51, Lorong Meranti, Off Jalan Kenanga, Kuala Lumpur to the plaintiffs who were the tenants of the premises.

The plaintiffs also sought for an order that a renewal of the tenancy be granted to the plaintiffs for a further period of two years as contained in the tenancy agreement that was executed between the plaintiffs and the first defendant on 6 July 2001.

Everything revolved on the premises in question.

Facts Of The Case

The plaintiffs were the tenants of the premises while the first defendant was previously the owner of the premises and the parties had signed a tenancy agreement dated 6 July 2001 in regard to the premises in question. The plaintiffs had rented the ground floor of the said premises since 1 September 2001 for a period of three years at a monthly rental of RM15,000 from the first defendant and the plaintiffs were operating an apparel business at the said premises.

By way of a sale and purchase agreement dated 27 June 2003, the first defendant had sold the premises to the second defendant without the knowledge of the plaintiffs and without giving any notice to the plaintiffs whatsoever. It

was only around the month of December 2003 that the plaintiffs found out about the sale of the premises to the second defendant.

As far as the second defendant was concerned it had purchased the premises from the first defendant. Meanwhile, the tenancy agreement between the plaintiffs and the first defendant had expired on 1 September 2004. And the second defendant, as the new owner of the premises, refused to renew the tenancy for a further period of two years in favour of the plaintiffs. As I said that tenancy agreement between the plaintiffs and the first defendant had expired on 1 September 2004. It must be borne in mind that when the second defendant entered into the sale and purchase agreement for the purchase of the premises from the first defendant, the second defendant had full knowledge that the premises were tenanted by the plaintiffs and that the sale of the premises were wholly subjected to the existing tenancy agreement.

Analysis

The tenancy agreement between the parties – referring to the plaintiffs and the first defendant, were for a period of three years. According to s. 213(1)(a) of the National Land Code 1965 ("NLC") a "tenancy exempt from registration" means "any tenancy or sub-tenancy for a term not exceeding three years granted pursuant to s. 223". A tenancy for a term not exceeding three years can either be in writing or in oral form according to the provision of the NLC. Here, it was in writing and there was no provision or term therein that makes it mandatory for the first defendant to give the first option to purchase the premises to the plaintiffs. It must be borne in mind that there is no machinery under the NLC for registering a tenancy. But there is a provision in the NLC for endorsement of the details of the tenancy on the title to the premises in question. Unfortunately, the plaintiffs as the tenants of the premises failed to endorse the tenancy and so their interests were not protected as against a *bona fide* purchaser for value to whom the landlord had sold the premises to. The second defendant can aptly be described as the *bona fide* purchaser for value of the premises in question. The doctrine of constructive notice or actual notice has no application to the facts of the present case. This is so notwithstanding that the second defendant had full knowledge that the premises was tenanted by the plaintiffs and that the sale of the premises was subjected to the existence of the tenancy agreement. It must be emphasised that the NLC expressly requires endorsement for protection against third parties (see ss. 213, 316 and 317 of the NLC). There are passages in the judgment of Hashim Yeop A Sani CJ (Malaya) (as he then was) in the case of *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 MLJ 404 SC that merits reproduction. It is this (see p. 408 to p. 409 of the report):

Under section 213(1)(a) of the Code 'tenancy exempt from registration' means any tenancy or sub-tenancy for a term not exceeding three years granted pursuant to section 223 of the Code, ie granted by the proprietor of any alienated land, by any lessee or sub-lessee for the time being and by any person holding under such tenancy or sub-tenancy.

We agree with the learned judge that the words 'all existing tenancies' must mean only tenancies protected by the Code. We adopt as the learned judge did what Dr. David Wong said in his book Tenure and Land Dealings in the Malay States at page 415 when referring to section 213(3) of the Code that '... unless so protected, a tenancy exempt from registration, granted after the commencement of the present Code will be defeated not only by a subsequent registered dealing but also by a subsequent statutory lien and even a subsequent tenancy both the later being non-registrable'.

That sums up the fate of the plaintiffs in relation to the premises in question.

Not to be outwitted, it was submitted on behalf of the plaintiffs that s. 228(1) of the NLC favoured the plaintiffs. The relevant part of that section enacts as follows:

Options for renewal, or for purchase of reversion.

228. (1) Any lease, sub-lease or tenancy granted under this Chapter may confer on the lessee, sub-lessee or tenant an option, exercisable at any time before the expiry of the term thereby created or its sooner determination:

(a) to require the grant to him of a lease, sub-lease or tenancy for a further term; or

(b) to purchase the reversion expectant on the existing term.

And it was submitted on behalf of the plaintiffs that s. 228(1) of the NLC was drafted with the intention of ensuring that equity, justice and fairness prevailed among the landowners, the registered as well as the non-registered tenants. Emphasis was laid on the usage of the word "may" in s. 228(1) of the NLC. It was pointed out that if the word "shall" had been used then the effect of this would be that if the landlord intends to sell his premises then it would be mandatory for the landlord to sell his premises to only the registered tenant or the existing tenant. In such an instance it is said that the landlord would be afforded absolutely no discretion and would be unable to sell his premises to any other persons. If such a situation were to arise, it is said that it would cause inequity and injustice should the landlord desire to sell his premises to his children, wife and relatives because s. 228(1) of the NLC would have rendered him unable to do so.

It is also pointed out that if the word "shall" had been used in s. 228(1) of the NLC then another situation of injustice would arise in that where the landowner is a holding company who intends to dispose of its land to its subsidiaries or to any other associated company the landowner would be prevented from doing so. Flowing from that it is submitted that the insertion of the word "may" in s. 228(1) of the NLC was deliberate and it was designed to avoid the unfair and unjust situations as envisaged above.

An argument was advanced on behalf of the plaintiffs that since s. 228(1) of the NLC had used the word "may" then it meant that should the landowner decides to sell the land to persons who are not connected by way of relationship to the landowner then the landowner has to give priority to the existing tenant the first option to purchase the premises. That is indeed a novel interpretation and if that interpretation is adopted it would mean that the first defendant here cannot sell the premises to the second defendant until the option to purchase the premises was accorded to the plaintiffs. So it was submitted that s. 228(1) of the NLC provides protection to both the registered as well as the existing tenants and it was for this reason that the plaintiffs could seek refuge under this section. It was submitted that since the first defendant has failed to give the first option to purchase to the plaintiffs, the apparel business of the plaintiffs was seriously affected. The matter was further aggravated by the sale of the premises to the second defendant who is a company carrying out a similar business to that of the plaintiffs. It was for this reason that the plaintiffs were said to be seriously prejudiced by the sale of the premises to the second defendant.

In ordinary parlance, the word "may" is permissive and generally the same word in a statute will not be held to be mandatory (*Nicholl v. Allen* [1862] 31 LJ QB 283; and *Cooper v. Hall* [1968] 1 WLR 360). According to the case of *Stylo Shoes v. Prices Tailors* [1960] 2 WLR 8, the word "may" is discretionary while the word "shall" must necessarily mean directory or mandatory. So where a statute, just like s. 228(1) of the NLC, gives a discretionary power, that discretion must be exercised fairly and reasonably. It must also be exercised according to common sense and justice. It must be, in short, exercised according to the recognised principles of judicial discretion. It cannot be exercised according to the "mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet" (*Lee v. Bude, etc, Ry* [1871] LR 6 CP 576 at p. 580 per Willes J; *Universal Cargo Carriers v. Citati* [1957] 1 WLR 979; and *Annison v. District Auditor for*

St Pancras BC [1962] 1 QB 489). Devlin LJ aptly said in *Berry v. British Transport Commission* [1962] 1 QB 306 at 326:

> The court has no power of its own motion to declare how the discretion conferred by a statute shall be exercised or to lay down rules about it. It derives its power from the statute itself according to the construction which it puts upon it – 'construction' being a word that embraces not only the interpretation of the words used but also the ascertainment of the true intent of the statute, considered in relation to the branch of the law with which it is dealing ... . It is the intent of every statute which confers a discretionary power that the power should be used justly.

In my judgment, applying the general principles of law as enunciated above, the word "may" in sub-s. (1) of s. 228 of the NLC does not make it mandatory for the first defendant to sell the said premises to the plaintiffs. The first defendant was under no obligation whatsoever to offer the plaintiffs the first option to purchase the premises in question. To it bluntly, s. 228(1) of the NLC does not provide protection to the plaintiffs who were the unregistered tenants.

As far as the second defendant was concerned, the crucial question to pose would be: whether the second defendant as a *bona fide* purchaser for value was bound by the tenancy agreement dated 6 July 2001 that was signed between the plaintiffs and the first defendant? The answer would be in the negative for the following reasons:

(1) the tenancy agreement dated 6 July 2001 did not bind the second defendant because it was not a party to it;

(2) the plaintiffs' refusal or failure to execute the novation agreement clearly showed that the plaintiffs had no intention to create any written agreement with second defendant;

(3) the tenancy agreement dated 6 July 2001 was not registered and no endorsement of the said tenancy agreement was made on the title deed of the premises in question;

(4) there was no valid written tenancy agreement executed between the plaintiffs and the second defendant;

(5) the second defendant was a *bona fide* purchaser for value; and, consequently

(6) the plaintiffs have no cause of action against the second defendant.

It was as clear as crystal that the second defendant was not a party to the tenancy agreement entered between the plaintiffs and the first defendant. A contract cannot, as a general rule, confer contractual rights or impose contractual obligations arising under it on any person except the parties to it. The parties to the contract must necessarily be the persons who signed the agreement. In *Kepong Prospecting Ltd v. Schmidt* [1968] AC 810, a third party made a claim to enforce a contract under the Malaysian law whereby consideration need not move from the promisee. In rejecting the claim, the Privy Council said (see p. 826 of the report):

> It is true that section 2 (d) of the Contracts Ordinance gives a wider definition of `consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties.

It can be surmised from the decision of the Privy Council that the doctrine of privity is distinct from the rule that consideration must move from the promisee.

Put in another way, a person could not enforce a contract to which he was not a party (*Tweddle v. Atkinson* [1861] I B & S 393; *Green v. Russell* [1959] 2 QB 226; and *Beswick v. Beswick* [1968] AC 58). Here, the second defendant was not a party to the tenancy agreement signed between the plaintiffs and the first defendant. In addition to that no novation agreement was signed between the plaintiffs and the second defendant and the first defendant.

What is a novation? It is a term taken from the Roman law and it arises where two contracting parties agree that a third, who must also agree, shall stand in relation to either of them to the other. In short, with the consent of both the contracting parties, all contracts of any kind may be transferred. It is a new contract and it is essential that the consent of all parties shall be obtained (*Rasbora Ltd v. JCL Marine Ltd* [1977] 1 Lloyd's Rep. 645; *The Blankenstein* [1985] 1 WLR 435; and *The Aktion* [1987] 1 Lloyd's Rep 283, 310 to 311). Bereft of the novation agreement, the plaintiffs originating summons in encl. (1) stood on flimsy ground and it must fail in limine.

Now, the second defendant is not only the purchaser of the premises, it is also the registered proprietor. No endorsement of the tenancy agreement has ever been made on the register document of title. Consequently, the tenancy agreement was not protected and it was unenforceable against the second defendant. Although the terms and conditions of the tenancy agreement were worded in this way:

> This Agreement shall be binding upon the respective heirs, personal representatives, successors in title of the parties hereto and permitted assigns of the tenant.

yet, the plaintiffs had no cause of action against the second defendant. *Halsbury's Laws of Malaysia*, at vol. 8, at p. 562 carries the following passage which merits reproduction. It is this:

> As an unendorsed tenancy only creates a personal interest, where there is a binding contract between landlord and tenant, any protection given will operate only against the proprietor who granted the tenancy, unless it is possible to make the successor to the landlord a constructive trustee.

Here, the facts do not show that there was a constructive trustee relationship between the second defendant and the plaintiffs. And I have said earlier that the doctrine of constructive notice or actual notice has no application to the facts of the present case. The absence of constructive trustee relationship and the non-application of the constructive notice concept weighed heavily against the plaintiffs.

On 15 September 2004 upon the request of the second defendant, the plaintiffs have returned all the keys to the premises to the second defendant's solicitors. The plaintiffs had acknowledged the creation of a monthly tenancy with the second defendant and by doing so, the monthly tenancy has come to an end (see the second defendant's affidavit dated 29 October 2004 and the plaintiffs' letter dated 15 September 2004 to the second defendant). Any contravention by the second defendant of the terms and conditions of the tenancy agreement cannot and would not make the second defendant liable under the tenancy agreement. It was certainly the prerogative of the second defendant to refuse to renew the tenancy in favour of the plaintiffs for a further period of two years without assigning any reasons whatsoever. The second defendant was certainly not bound by the existence of that tenancy agreement between the plaintiffs and the first defendant. Knowledge on the part of the second defendant of the terms and conditions of that tenancy agreement cannot be used to impute liability on the part of the second defendant.

The stand of the second defendant was simply this. That the refusal on the part of the plaintiffs to sign the deed of novation showed beyond per adventure that the plaintiffs had no intention to create any written contractual obligations with the second defendant. That s. 267(2) of the NLC recognises only a tenancy that has been endorsed on the register document of title and the present case was not one of them. That the second defendant would not indemnify the first defendant against any claim instituted by the plaintiffs under the tenancy agreement because that tenancy agreement was created between the plaintiffs and the first defendant before the transfer of the premises to the second defendant. That in the absence of the novation agreement, the second defendant was not under any capacity nor obligation to offer the renewal of the tenancy to the plaintiffs for a further period of two years. All these factors, taken cumulatively, rendered the plaintiffs as lame ducks, so to speak, in the context of encl. (1).

Conclusion

For the reasons as adumbrated above, I dismissed encl. (1) with costs.